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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EUGENE EWAN MORI, PETITIONER

vs.

MELVIN GITTLEMAN and THE BANK OF N.J.,
AS ADMINISTRATOR PENDENTE LITE OF THE ESTATE
OF EUGENE MORI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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67 pp

QUESTIONS PRESENTED

1. Where an attorney performs services for a decedent's Estate and that attorney also, pursuant to an entirely independent and distinct contractual arrangement performs other services for an individual who happens to be a beneficiary of the decedent's Estate, and where that attorney is involved in forgery of checks drawn to the individual client and felonious misappropriation of that individual client's funds, which forgery and felonious misrepresentation were never disclosed to the Probate Court and was never discovered by the individual client until much later, and where the attorney himself has to this day never denied his involvement in the forgery and felonious misappropriation of his client's funds, does an Order of the Probate Court which solely approves the fees charged by the attorney for services performed for the Estate and which Order does not pass upon the legitimacy of the fees charged by the attorney to the individual, the attorney never even

haying applied to the Probate Court for approval of his fees charged to the individual client, thereafter bar the individual client from an action against the attorney for forgery and fraudulent misrepresentation of that client's funds and for a determination as to the legitimacy of the fees that the attorney attempted to charge to the client?

2. Can a matter as serious as felonious misrepresentation of a client's funds through forgery and other illegal means simply be cast aside by the granting of a Summary Judgment ruling where the cleint was never given an opportunity to fully present his case, complete discovery, or take the Deposition of the attorney charged, and where the Court accepted verbatim and without taking testimony the lengthy and false Brief and Affidavit of the attorney charged, and where the court chose to totally ignore the serious charges and well-documented case presented by plaintiff, especially considering the fact that the attorney has never denied the wrongful misappropriation of his client's

funds?

3. Where an attorney and client have a personal contract for the performance of legal services, totally distinct and independent from services which the attorney has performed for the decedent's Estate, the client also happening to be a beneficiary of the decedent's Estate, is an Estate proceeding the proper forum where the client must be reasonably expected to raise issues concerning the attorney's felonious misrepresentation of the client's personal funds and forgery of checks drawn to the client and the issue of the legitimacy of the fees charged to him by that attorney for the personal services, especially considering that the attorney never even applied to the Probate Court for approval for fees for services he rendered to his individual client and the felonious misappropriation and forgery were never disclosed to the court and were not discovered until much later?

4. Can the doctrines of res judicata and/or collateral estoppel be held to apply

to a situation where an application for court approval of fees attempted to be charged by an attorney against an individual client has never been filed and where notice has never been given to the client that court approval would be sought by the attorney for allowance of such fees, and where court approval was never in fact granted and the fees of the attorney attempted to be charged against the client were therefore never passed upon or approved by that court?

5. Do the doctrines of res judicata and collateral estoppel apply to a dispute as to the propriety of fees charged by an attorney to his client and the issue of that attorney's wrongful misappropriation of his client's funds, when there was no prior opportunity for the client to object to the fees charged to him by that attorney since that attorney never made any application in any other Court to approve or permit fees which he alleged to have charged his client?

6. Should an attorney be permitted to

benefit from his own wrongdoing by hiding behind the doctrines of res judicata and collateral estoppel and thereby avoiding having to answer for his alleged forgery of a client's name to checks drawn to the client and misappropriation of that client's funds?

7. As a matter of public policy, should an attorney be permitted to avoid having to answer to charges of forgery of a client's checks and misappropriation of a client's funds by asserting the doctrines of res judicata and collateral estoppel, when the client never had an opportunity to previously raise those charges?

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Third Circuit are listed in the caption. The Bank of New Jersey as Administrator Pendente Lite of the Estate of Eugene Mori, deceased, is not involved in this matter any longer, the only relevant respondent being Gittleman.

EDITOR'S NOTE

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2 The Courts Below have Misunderstood the Purpose and Impact of N.J.S.A. 3B:17-8. By its Clear Terms the Statute Exonerates and Discharges the Fiduciary from all Claims of all Interested Parties. It does not Exonerate and Discharge Someone Like Gittleman who was Never a Fiduciary in this Matter, and the Statute was Never Intended to Protect a Wrongdoer such as him 41

3 Attorney Melvin Gittleman has been Rewarded by the Lower Courts for his Wrongdoing. Although he has Obviously been a Party to Criminal Wrongdoing and Serious Ethical Misconduct, the Lower Courts have not Even Made any Reference to Such Violations and Have Totally Glossed Over his Reprehensible Actions. As a Matter of Public Policy, an Attorney and Officer of the Court Should not be Permitted to Avoid Answering Charges of Forgery of a Client's Checks and Misappropriation of a Client's Funds by Asserting the Doctrines of Res Judicata and Collateral Estoppel, When the Client Never had an Opportunity to Previously Raise Those Charges Against the Attorney 45

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

Eugene Ewan Mori, appearing as Attorney Pro Se, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported. The Opinion is contained in the Appendix, infra, p. 44a.

The Report and Recommendation of Magistrate Haneke, adopted in its entirety by Judge Fisher, granting Summary Judgment in favor of Gittleman is not reported. The Report and Recommendation of Magistrate Haneke is contained in the Appendix, infra p. 14a.

The Opinion of Judge Fisher granting Summary Judgment in the District Court in favor of The Bank of New Jersey is not reported. The Opinion of Judge Fisher is contained in the Appendix, infra, 1a.

JURISDICTION

The judgment of the Court of Appeals (App. infra 44a was entered on January 29, 1985.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The only pertinent statutory provision in any way involved in this case is N.J.S.A. 3B:17-8 which reads:

> A judgment allowing an account, including a guardian's intermediate account, after due notice, shall be res adjudicata as to all exceptions which could or might have been taken to the account, and shall constitute an approval of the correctness and propriety of the account, the legality and propriety of the investments and other assets, the legality and propriety of the changes in investments or other assets, and the legality and propriety of other matters, and also shall exonerate and discharge the fiduciary from all claims of all interested parties and of those in privity with or represented by interested parties except:
>
> a) for the investments and other assets in the fiduciary's hands at the close of the period covered by the account, and assets which may come into his hands after the close of the account;
>
> b) insofar as exceptions to the account shall be taken and sustained; and
>
> c) as relief may be had from a judgment in any civil action.

It should be noted that the impact of this Statute has been incorrectly interpreted by the Courts below. The Statute clearly states

that a judgment allowing an account shall be res judicata as to all exceptions which could or might have been taken to the account and shall exonerate and discharge the fiduciary from all claims of all interested parties.

The Courts below have interpreted this Statute to protect Gittleman. Gittleman, however, was never a fiduciary with respect to this case. The fiduciary was The Bank of New Jersey as Administrator Pendente Lite of the Estate of Eugene Mori, deceased. Judge Fisher granted Summary Judgment in favor of The Bank of New Jersey based upon this Statute.

Judge Fisher and the Court of Appeals, however, erroneously misinterpreted this Statute and erroneously held that the protection of this Statute is afforded to Gittleman. This could not possibly be correct as Gittleman was never an individual who was intended to be protected by this Statute. The only ones to be exonerated or discharged are fiduciaries, and Gittleman does not fall into that class.

STATEMENT OF THE CASE

(1) FACTUAL BACKGROUND

Plaintiff Eugene E. Mori hired Melvin Gittleman, Esquire, in June, 1974 to file real estate tax appeals for the year 1974 for properties located in North Bergen, New Jersey, and owned jointly by plaintiff and his father, Eugene Mori. Plaintiff owned a 25% interest in these properties and his father owned a 75% interest.

At the time of Gittleman's hiring, plaintiff's father was in a coma, having suffered a severe stroke. Eugene Mori died on October 8, 1975, and The Bank of New Jersey was appointed Administrator Pendente Lite of the Estate of Eugene Mori.

The Retainer Agreement executed between plaintiff and Gittleman hired Gittleman solely for the purpose of prosecuting tax appeals, for properties owned by plaintiff and his father, for the year 1974 only. Thereafter, plaintiff had no other deals with Gittleman for prosecuting tax appeals for other years for properties

owned by plaintiff.

Nevertheless, The Bank of New Jersey decided to retain Gittleman to file tax appeals for subsequent years for properties owned by the Estate. Obviously, plaintiff was not a party to such negotiations between Gittleman and The Bank of New Jersey, and just as obviously The Bank of New Jersey had no authorization to make any agreement with Gittleman which would be binding upon plaintiff.

Subsequent to the death of plaintiff's father, a Partition Action was instituted in the New Jersey Superior Court, Hudson County. A Consent Judgment was entered on November 18, 1977, partitioning the property that had been jointly owned by plaintiff and his father. Seventy-five percent of the property was allocated to the Estate and 25% was allocated to plaintiff.

(2) FORGERY AND MISAPPROPRIATION OF FUNDS BY GITTLEMAN

Gittleman successfully prosecuted the tax appeals for 1974 for which plaintiff had hired him. As a result, plaintiff became entitled to personally receive the sum of $121,609.05 in tax refunds from the Township of North Bergen, based upon his 25% ownership interest in the pertinent property. The fee agreement that had been entered into between plaintiff and Gittleman entitled Gittleman to receive 1/6 of the tax saving as his fee, therefore, Gittleman's fee for services performed for plaintiff should have amounted to $20,268.18.

Gittleman claimed, however, that he was entitled to a fee from plaintiff in the sum of $33,055.53. Although plaintiff had never hired Gittleman for any other purpose but the 1974 tax appeals, Gittleman attempted to charge plaintiff a substantial additional fee for services Gittleman performed relative to the years 1979 and 1980 at the behest of the Estate,

claiming plaintiff received some benefit therefrom, despite the fact that plaintiff had never reached any fee agreement with Gittleman on these issues nor did he ever authorize Gittleman to do any such work for him, nor did he ever approve Gittleman doing such work for him.

Gittleman apparently let greed get the better of him, and he decided to utilize self-help techniques to assure that he would receive payment for the fee he claimed due to him from plaintiff. It was at this point in time that Gittleman engaged in obvious illegal conduct.

As previously set forth, plaintiff was entitled to tax refunds from North Bergen in the sum of $121,609.05, and North Bergen thereafter issued various drafts made payable to plaintiff for sums totalling such amount. In an apparent conspiracy with North Bergen, defendant somehow obtained from North Bergen several checks drawn from North Bergen to plaintiff, totalling $31,968.83, such checks representing partial payment of the tax refunds due to plaintiff.

It is clear that the aforesaid drafts were issued to plaintiff as payee. Plaintiff, however, never saw nor received these drafts. Instead, Gittleman, by his own admission, "retained tax refund checks from the Township in the amount of $31,968.83", leaving it to one's imagination as to how Gittleman could possibly have obtained from North Bergen checks which were drawn to Eugene E. Mori.

Mr. Mori never authorized anyone to endorse his signature on these checks, and quite obviously his signature was forged either by Gittleman or by someone else at Gittleman's direction.

The exact manner in which Gittleman obtained the misappropriated checks from North Bergen has never been determined, plaintiff having been denied the opportunity to depose Gittleman at the Trial level. Despite having filed voluminous documents on his own behalf in the District Court, Gittleman has never stated nor set forth how he obtained or negotiated the checks in question.

(3) GITTLEMAN'S FEE APPLICATIONS IN THE PROBATE COURT

The Estate of Eugene Mori was probated in the New Jersey Superior Court, Chancery Division, Burlington County, before Honorable Alexander C. Wood, III. Gittleman had been independently hired by The Bank of New Jersey to prosecute various tax appeals for the Estate. As a result of favorable prosecution of such appeals on behalf of the Estate, the Estate was entitled to refunds from North Bergen in the sum of $364,825.53 for the years 1974 through 1978. Gittleman had entered into an agreement with The Bank of New Jersey entitling him to a fee of 1/6 of the tax savings for those years plus expenses. Such fees and expenses had to be approved by Judge Wood.

The Bank of New Jersey, as Administrator Pendente Lite of the Estate of Eugene Mori, deceased, submitted before Judge Wood an application for a Third Accounting, and in such application Gittleman requested payment for the sums due

to him for services performed for the Estate. Significantly, Gittleman made no application whatsoever to the Probate Court for approval for any fees charged by him to plaintiff, Eugene E. Mori.

It was indicated to the Court that the Estate would be responsible for 75% of the fees and costs submitted by Gittleman, the Estate being the owner of an undivided 75% interest in the property. It was made clear that any claim of Mr. Gittleman against Eugene E. Mori would have to be pursued independently, and that the Estate would not be responsible for same. The Judgment on the Third Intermediate Account approved payment to Mr. Gittleman of 75% of the fees and costs requested.

The Judgment on the Third Intermediate Account did not, however, approve any fees allegedly due to Gittleman from plaintiff. The issue of plaintiff's responsibility for services performed on his behalf by Gittleman was never before the Probate Court. It was a simple matter of a contractual arrangement between Gittleman and plaintiff which had nothing to do with the Estate

proceeding. It is quite clear that Gittleman never applied to the Probate Court for it's approval of fees charged by him to Mori, and it is equally clear that Judge Wood never considered nor passed upon this issue.

As there was never any application in the Probate Court for approval of fees charged by Gittleman to plaintiff, plaintiff never had an opportunity to object to, contest, or otherwise be heard on the propriety of the fees Gittleman was attempting to charge him until plaintiff filed his action against Gittleman in the United States District Court for the District of New Jersey.

None of the vast multitude of documents filed in the Probate action ever indicated that Gittleman had obtained tax refund checks that had been drawn payable from the Township of North Bergen to Eugene E. Mori. Nor was there any indication that those checks had somehow been negotiated by Gittleman. The issue of whether Gittleman wrongfully forged and misappropriated checks that belonged to plaintiff was never considered, raised,

or litigated before Judge Wood. This was properly so, as Gittleman had never filed any application before Judge Wood for fees against plaintiff, and the relationship between plaintiff and Gittleman was something entirely foreign to the Estate matter.

(4) PROCEEDINGS IN THE COURTS BELOW

Plaintiff instituted the within action in the United States District Court for the District of New Jersey against both defendant Gittleman and The Bank of New Jersey as Administrator Pendente Lite of the Estate of Eugene Mori, deceased. The primary defendant was always Gittleman, and the Administrator was initially included in the suit on the basis of information and belief that there may have been improper collusion between Gittleman and the Administrator which resulted in Gittleman having wrongfully obtained and wrongfully misappropriated the checks drawn to plaintiff's order.

The Administrator, in October, 1982, moved to dismiss the Complaint pursuant to F.R.C.P. 12(b), and the Motion was argued before the Honorable Clarkson S. Fisher. Judge Fisher dismiss the Complaint against The Bank of New Jersey on the basis of res judicata.

Judge Fisher's decision was based upon the application of N.J.S.A. 3B:17-8 which provided, in pertinent part, that a Judgment allowing an

account "shall exonerate and discharge the fiduciary from all claims of all interested parties...". As plaintiff had been a beneficiary of his father's Estate, the fact that he did not object to the Administrator's actions in the Probate Court was held to prohibit him from further proceedings against the Administrator.

Subsequently, Gittleman filed a Motion for Summary Judgment, claiming that the doctrines of res judicata and collateral estoppel should bar any claims of plaintiff against Gittleman. Oral argument was heard before Magistrate Haneke on January 9, 1984, and on June 27, 1984, Magistrate Haneke issued his Report and Recommendation.

Plaintiff prepared and submitted detailed written objections to the Report and Recommendation, however, it is clear that the District Court never referred to such objections, as the date of mailing of plaintiff's objections, July 10, 1984, was the same date that Judge Fisher adopted the Magistrate's Report and granted Summary Judgment in Gittleman's favor.(*)

Although oral argument before Magistrate Haneke took place on January 9, 1984, Magistrate Haneke's Report and Recommendation was not issued until June 27, 1984. Plaintiff had represented himself pro se at oral argument, having discharged his attorney only several days earlier. Plaintiff had only received the voluminous amount of paperwork and documents in his file from his prior attorney several hours before the oral argument. Plaintiff appeared before Magistrate Haneke and virtually begged and pleaded with him to grant plaintiff a brief postponement so that he could either obtain another attorney or himself have sufficient time to prepare for oral argument. Magistrate Haneke denied the request and plaintiff was forced to proceed pro se without having had sufficient opportunity for the detailed prepar-

(*) Plaintiff had obtained an extension of time for filing his written objections to the Report and Recommendation of Magistrate Haneke, and under the circumstances Judge Fisher's decision was rendered prematurely, Judge Fisher obviously not having taken the opportunity to review a 21 page single spaced typewritten letter by plaintiff objecting to various aspects of Magistrate Haneke's Report and Recommendation.

ation that was obviously necessary to properly argue the case.

After the oral argument took place, there was no further visible action concerning the case until June, 1984. Finally, plaintiff became puzzled by the delay of many months without receipt of a decision and wrote a letter to Magistrate Haneke dated June 20, 1984, inquiring as to whether the Magistrate had finished his opinion. The response was Magistrate Haneke's Report and Recommendation dated June 27, 1984.

It appears that Magistrate Haneke really spent very little time considering plaintiff's arguments in writing his Report and Recommendation, as it was 95% quoted directly and verbatim from the Brief that had been submitted on behalf of Gittleman. It certainly appeared to plaintiff that Magistrate Haneke had merely placed the matter aside, and after having received plaintiff's letter, the Magistrate quickly put together the Report and Recommendation by copying word for word from the Gittleman Brief. Magistrate Haneke totally avoided making any reference whatsoever

in his Report and Recommendation to the many arguments that had been raised on behalf of the plaintiff and further made no reference to the obviously improper conduct of Gittleman. Just as obviously, Judge Fisher merely rubber-stamped Judge Haneke's Report and Recommendation.

It is clear that Magistrate Haneke and Judge Fisher accepted verbatim the Brief submitted by Gittleman, despite the fact that the Brief contained many false and inaccurate statements. Plaintiff had been denied the opportunity to take Gittleman's Deposition, and the decision made by Judge Fisher was made without any testimony having been taken whatsoever. Magistrate Haneke and Judge Fisher further totally ignored the arguments that had been submitted by plaintiff, despite the fact that plaintiff's charges of Gittleman's forgery and felonious misappropriation of funds was well documented.

The issue of fees charged by Gittleman to the plaintiff was never properly before the Probate Court, nor were such issues ever adjudicated

by the Probate Court. Nevertheless, Magistrate Haneke and Judge Fisher apparently felt that plaintiff felt that plaintiff somehow should have objected to a non-existent fee application and granted Summary Judgment in favor of defendant based upon the doctrines of res judicata and collateral estoppel.

Plaintiff appealed to the United States Circuit Court of Appeals for the Third Circuit, and in an extremely brief Opinion, the Court affirmed, on the basis of res judicata and collateral estoppel. The Circuit Court of Appeals made no reference whatsoever to Gittleman's wrongdoing or to the many other arguments that had been raised by plaintiff. The Court's Memorandum Opinion was filed and Judgment was entered on January 29, 1985.

The basis for federal jurisdiction in this case is diversity of citizenship, plaintiff being a citizen of the State of Florida, and defendant being a citizen of the State of New Jersey.

REASONS FOR GRANTING THE PETITION

(1). THE LOWER COURTS HAVE TOTALLY MISINTERPRETED, MISCONSTRUED AND MISAPPLIED THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL TO THE PERTINENT FACTS IN ISSUE, CONTRARY TO EXISTING CASE LAW.

This case presents extremely important quesions concerning the applications of the doctrines of res judicata and collateral estoppel. A review of the facts and the appropriate law clearly indicate that the lower courts have totally misconstrued the applications of these doctrines. The lower courts have improperly extended these doctrines to a situation where there was neither an identity of issues in the two cases nor an actual litigation of the issues to which the estoppel was held to apply.

Further, plaintiff totally lacked a full and fair opportunity to litigate the issue of the defendant's forgery and wrongful misappropriation of funds as well as the issue of the propriety of the defendant's fees charged to

him, as those issues were never raised before the Probate Court, nor could they have been properly raised in the Probate Court.

Gittleman's felonious misappropriation of funds and involvement in forgery were obviously never disclosed by him to the Probate Court, and plaintiff was never aware of Gittleman's criminal misconduct until it came somewhat to light in the Bankruptcy Court through the testimony of Vincent Gentile. It was at that time that plaintiff learned that checks issued by the Township of North Bergen and drawn payable to him had been negotiated by Gittleman without plaintiff ever having seen or endorsed those checks. Plaintiff attempted to raise these issues before Judge Lipkin in the Bankruptcy Court, however, Judge Lipkin instructed plaintiff that such issues would have to be determined in another forum. Therefore, plaintiff instituted the within proceeding, this case having been plaintiff's first opportunity to raise and litigate issues pertinent to Gittleman's criminal misconduct and the propriety of the fees Gittleman

was attempting to charge plaintiff.

At least four elements must be satisfied before an Order in a former action can be given collateral estoppel effect in a later proceeding:

> (1) the issue sought to be precluded must be the same as that involved in the prior action;
>
> (2) the issue must have been actually litigated;
>
> (3) it must have been determined by a valid and final judgment; and
>
> (4) the determination must have been essential to the prior judgment.
>
> Haize v. Hanover Ins. Co., 536 F.2d 576, 579 (3d Cir. 1976).
>
> Feniello vs. University of Pennsylvania Hospital, 558 F.Supp. 1365 (U.S.D.C., 1983).

At least three of the four elements set forth above were lacking in this case, when one analyzes what actually occurred in the proceedings in the Probate Court:

(1) The issues in the two cases involved were not identical;

(2) The issues of Gittleman's forgery and wrongful misappropriation of funds as well as the issue of the propriety of Gittleman's

fees charged to plaintiff were neither raised nor litigated in the Probate action; nor was there any disclosure by Gittleman to the Probate Court that a forgery and misappropriation of funds had been committed;

(3) Neither the issues of Gittleman's forgery and wrongful misappropriation of funds nor the issue of the propriety of Gittleman's fees as charged to plaintiff was essential to the Judgment of the Probate Court approving Gittleman's fees for services performed for the Estate.

The statements of Justice Arlin Adams in Donegal Steel Foundry Co. v. Accurate Products Co., 516 F 2d. 583 (3d. Circ., 1975) at p. 588 are clearly applicable to this case:

> "...If a court of competent jurisdiction decides a matter distinctly put in issue, relitigation of the same question in a subsequent proceeding may be barred by the rule of collateral estoppel. The conclusive effect of a prior adjudication constitutes an estoppel only with respect to issues actually litigated and necessary to support the initial judgment. Litigation of any matter that was 'collaterally in question', 'incidentally cognizable', or 'to be inferred by argument from the judgment' is not

restricted in a subsequent suit.

> Without identity of issues, the party asserting the collateral estoppel may not prevail. For an issue to have been conclusively determined, it must have been raised in the prior action. In the case at hand the requisite identity of the issue is missing. ...
>
> Since Accurate's pleas of res judicata and collateral estoppel are of doubtful merit under either federal or New Jersey law we find no bar to the adjudication of the issue in the district court."(*)

Gittleman's pleas of res judicata and collateral estoppel are of no merit whatsoever. They are merely attempts at legal maneuvering and machination by a desperate attorney trying anything to avoid having to answer for his criminal and unethical misconduct.

(*) Footnotes deleted.

(A). IDENTITY OF ISSUES.

Central to the concept of the application of the doctrines of res judicata and collateral estoppel is the necessity that the issues presented in each case are identical.

> "Whatever ease or difficulty there may be in distinguishing an issue, the identity of the issue must be the same in order to justify the application of the doctrine of res judicata. It is necessary 'that the right to relief in the one suit shall rest upon the same point or question which, in essence and substance, was litigated and determined in the first suit * * *." In re Walsh's Estate, 80 N.J. Eq. 565, 569. "The scope of the estoppel of a judgment depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand, or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action."

Miller v. Stieglitz, 113 N.J.L. 40, 44.

Godomsky v. Freeman, 120 N.J.L. Page 116 (1938).

Collateral estoppel means "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot

again be litigated between the same parties in any future lawsuit. Ashe v. Swenson, 397 U.S. 436, 443, 90 S. Ct. 1189, 1194, 25 L. Ed. 2d. 469, 475 (1970)." State vs. Redinger, 64 N.J., Page 41, (1973).

> "It is academic that the facts and issues must be the same in a subsequent case if the complainants are to be estopped on the theory of res adjudicata.
>
> 2 Freeman on Judgments 1322, states the doctrine as follows:
>
> 'Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties or their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue and adjudicated in the first suit. Where a right, question or fact is distinctly put in issue and directly determined by a court of competent jurisdiction in a former suit between the same parties or their privies, the former adjudication of that fact, right or question is binding on the parties or their privies in a subsequent suit, irrespective of whether the causes of action are the same.'"

Walker v. Pennsylvania-Reading S.S. Lines, 142 N.J. Eq., Page 588 (1948).

The basic issues involved in the within matter are two-fold:

(1). Were the fees charged by Gittleman to plaintiff proper in light of the Retainer Agreement executed between plaintiff and Gittleman?

(2). Did Gittleman wrongfully misappropriate funds belonging to plaintiff and is Gittleman guilty of forgery or other criminal misconduct?

The aforesaid issues are totally distinct from the issues raised and litigated in the Probate Court. The sole pertinent issue before Judge Wood was whether or not he should approve the fees that Gittleman had applied for with respect to services rendered solely to the Estate. Gittleman never applied for Court consideration or approval of fees for services he had allegedly rendered to plaintiff. The very moving papers filed by Gittleman merely request an allowance for fees for services performed for the Estate. The Probate Court had no jurisdiction to determine a personal fee dispute between

plaintiff and Gittleman. Obviously realizing this, Gittleman never made any application to the Probate Court to determine any issues relative to the personal contractual relationship between Gittleman and plaintiff.

The issues of Gittleman's felonious misappropriation of funds and forgery were never properly before the Probate Court, nor could such issues have been raised, given the facts that the forgery and felonious misappropriation only came to light many months later, evidence of same being discovered while plaintiff was in the midst of his Bankruptcy proceeding.

(B). THE ISSUE MUST HAVE BEEN ACTUALLY LITIGATED.

"Res judicata as a principle of law bars a party from relitigating a second time what was previously fairly litigated and determined finally." City of Hackensack vs. Winner, 162 N.J. Super. 1 at 27. (App. Div., 1978).

As stated by the Supreme Court of New Jersey in Mazzilli v. Accident, &c., Casualty Ins. Co., etc., 26 N.J. 307 (1958) at Page 314:

> "...where the second action is upon a different claim or demand, but between the same parties, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, - not what might have been thus litigated and determined, - for it is only upon such matters as were actually litigated and determined that the judgment is conclusive." (Emphasis added)

In Allesandra v. Gross, 187 N.J. Super 96 (App. Div. 1982), the Court stated at pp.

105-106:

> "The second aspect of the requirement that the judgment be on the merits is that the factual issue must actually have been litigated and determined. Robinson-Shore Develop. Co. v. Gallagher, 26 N.J. 59,68 (1958). This requirement is explained fully in comments d and e to § 27 of the Restatement, Judgments 2d, as follows:
>
> d. When an issue is actually litigated. When an issue is properly raised by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated within the meaning of this Section. ...
>
> e. Issues not actually litigated. A judgment is not conclusive in a subsequent action as to issues which might have been but were not litigated and determined in the prior action."

It is extremely significant to note that there has never really been any previous litigation between plaintiff and Gittleman. The prior litigation in the Probate Court involved the Estate of Eugene Mori, deceased, and Gittleman's involvement in that proceeding was merely by means of an application filed by him for the Probate Court to allow him a fee for services he had rendered to the Estate.

Gittleman's involvement in forgery and

felonious misappropriation of his client's funds were never disclosed to the Probate Court and there was never any opportunity to have had those issues raised before the Probate Court. Further, the issue of the propriety of the fees that Gittleman claimed against plaintiff was never properly before the Probate Court, Gittleman never having made any application for approval of same, and therefore such issue was also never actually litigated in the Probate Court.

Plaintiff never learned of Gittleman's forgery and felonious misappropriation of funds until such issues were eventually disclosed in the Bankruptcy proceeding, and when plaintiff attempted to pursue these issues in the Bankruptcy Court, he was told that these issues would have to be raised in another forum. Therefore, plaintiff instituted the within action against Gittleman, and this action represented plaintiff's first opportunity to properly raise or litigate these critical issues.

"The prior Judgment can only raise an estoppel

against the plaintiff in the present action as to those questions, issues or facts which were actually litigated and determined in the prior action." Mazzilli v. Accident &c., Casualty Ins. Co., etc., supra, at p.307.

The lower courts have thus definitely committed substantial error by barring plaintiff's action on the bases of res judicata and collateral estoppel.

(C) QUESTIONS CONCERNING GITTLEMAN'S FORGERY AND FELONIOUS MISAPPROPRIATION OF HIS CLIENT'S FUNDS, AS WELL AS ISSUES RELATIVE TO THE PROPRIETY OF THE FEES HE ATTEMPTED TO CHARGE PLAINTIFF WERE MATTERS WHICH WERE COLLATERAL TO THE ISSUES BEFORE THE PROBATE COURT AND A DETERMINATION OF THOSE ISSUES WAS NOT ESSENTIAL TO THE JUDGMENT OF THE PROBATE COURT.

Yet another required element for the application of the doctrine of collateral estoppel is lacking in the present case. An Order in a former action can be given collateral estoppel effect in a later proceeding only if the determination must have been essential to the prior Judgment. Feniello vs. University of Pennsylvania Hosp., supra.

As stated by the Supreme Court of New Jersey in Mazzilli vs. Accident, &c., Casualty Ins. Co., etc., supra, at pp. 315-316:

> "...the doctrine of collateral estoppel does not extend to every fact which may have been litigated in the prior action. The doctrine is restricted to matters or facts directly in issue and does not extend to 'any matter which came collaterally in question * * * nor * * * any matter incidentally cogni-

zable, nor * * * any matter to be inferred by argument from the judgment.' Mullaney v. Mullaney, 65 N.J. Eq. 384, 388 (E. & A. 1903); Freeman, Judgments (5th ed. 1925), § 691. Thus a distinction must be drawn between those matters or facts which were directly in issue and those described as merely collateral or incidental. Freeman suggests the following basis for the distinction between the two:

'The doctrine of estoppel is restricted to facts directly in issue and therefore does not ordinarily extend to facts which may be in controversy, but which rest in evidence and are merely collateral even though they may have been passed upon.' 'A fact or matter in issue is that upon which plaintiff proceeds by his action, and which the defendant controverts in his pleadings, while collateral facts are such as are offered in evidence to establish the matters or facts in issue.'

During the trial of a cause, evidence may properly be received of the existence or nonexistence of facts which, though they bear upon an issue and tend to show on which side of it the truth is, are not, though conceded to exist, necessarily conclusive. It is this class of facts which the courts have usually intended to designate by the terms 'collateral', 'incidental', or 'not directly in issue', and therefore as not being proved or disproved by the judgment, though controverted at the trial, and perhaps passed upon by the court or jury and exercising a controlling effect over the verdict and judgment." [Id., § 690, at p. 1457]

Issues relative to the forgery by Gittleman of plaintiff's signature to checks drawn to plaintiff as payee, Gittleman's felonious misappropriation of funds, and the propriety of the fees Gittleman charged to plaintiff were totally unrelated to the issue before the Probate Court.

The sole issue before the Probate Court was whether or not it should approve Gittleman's fee for services he had rendered to the Estate. The wrongdoing of Gittleman vis a vis plaintiff was an issue totally distinct from the services which Gittleman had performed for the Estate.

D) PLAINTIFF NEVER HAD AN OPPORTUNITY TO BE HEARD IN THE PROBATE COURT EITHER ON THE QUESTIONS OF FORGERY AND CRIMINAL CONDUCT OF GITTLEMAN OR ON THE ISSUE OF THE PROPRIETY OF GITTLEMAN'S FEES CHARGED TO PLAINTIFF.

Plaintiff never had a full and fair opportunity to litigate the question of the propriety of Gittleman's fees or the issues of Gittleman's forgery and criminal misconduct in the Probate Court. The Probate Court obviously was not a proper forum for these questions to be adjudicated, as the sole pertinent issue involving Gittleman was the propriety of the fees he was attempting to charge to the Estate for services he had rendered to the Estate.

As Gittleman never made any application whatsoever concerning services performed for plaintiff and never disclosed his wrongful misconduct in the Probate proceedings, plaintiff lacked any full and fair opportunity to litigate those issues in the Probate Court.

"The party precluded from relitigating the

issue must have had ... a full and fair opportunity to litigate the issue in the first action." Eatough vs. Board of Medical Examiners, 191 N.J. Super 166, at p.175 (App. Div., 1983). See also N.J. Manufacturers Insurance Co. vs. Brower, 161 N.J. Super 293, at 298-299 (App. Div., 1978), Allesandra vs. Gross, 187 N.J. Super 96, at 104-105 (App. Div., 1982), Restatement, Judgments 2d., Sect. 29 (1980).

It is quite apparent that plaintiff never had a full and fair opportunity to litigate, nor did he have a right entitling him to be heard in the Probate Court on these crucial issues. The within action was the first opportunity that plaintiff had been afforded to litigate against Gittleman. The erroneous decisions of the lower courts have prevented plaintiff from having his day in court and have permitted Gittleman to profit from, avoid having to account for, and be rewarded for his own wrongdoing.

(E) PLAINTIFF WAS NOT A PARTY IN THE PROBATE ACTION WITH RESPECT TO HIS PERSONAL RELATIONSHIP WITH GITTLEMAN.

The lower courts have totally failed to grasp the distinction between plaintiff acting in his capacity as a beneficiary of his father's Estate as opposed to plaintiff's capacity as a client of an attorney who has perpetrated a wrongdoing upon his client.

Judge Fisher granted summary judgment on behalf of The Bank of New Jersey on the basis of plaintiff's failure to object in the Probate Court to the Intermediate Accountings filed by The Bank of New Jersey. Pursuant to N.J.S.A. 3B:17-8, plaintiff was held to be a party with respect to The Bank of New Jersey acting as fiduciary, as plaintiff was a beneficiary of his father's Estate.

On the other hand, plaintiff was never a party in the Probate Court with respect to his relationship with Mr. Gittleman. Plaintiff's contractual relationship with Gittleman had nothing whatsoever to do with the fact that he was also

a beneficiary of his father's Estate. The Probate Court was certainly not the proper forum for a fee dispute between plaintiff and Gittleman. Nor was the Probate Court a proper forum for a hearing on criminal charges against Gittleman for actions he had taken involving plaintiff's personal funds.

"Central to the application of the doctrine is that the party against whom the doctrine is to be invoked must have been a party to or privy to the prior proceedings." Wunschel vs. City of Jersey City, 96 N.J. 651, 658 (1984). While plaintiff was a party vis a vis The Bank of New Jersey as fiduciary of his father's Estate, he certainly was not a party in the Estate proceeding vis a vis his private contractual relationship with Gittleman. The lower Courts totally failed to grasp this most significant distinction with respect to the two different capacities in which plaintiff was involved, and as a result, a substantial miscarriage of justice has resulted, enabling Gittleman to violate criminal laws and Canons of Ethics

without having to answer to an appropriate Court for his misconduct and wrongdoing.

(2). THE COURTS BELOW HAVE MISUNDERSTOOD THE PURPOSE AND IMPACT OF N.J.S.A. 3B:17-8. BY ITS CLEAR TERMS THE STATUTE EXONERATES AND DISCHARGES THE FIDUCIARY FROM ALL CLAIMS OF ALL INTERESTED PARTIES. IT DOES NOT EXONERATE AND DISCHARGE SOMEONE LIKE GITTLEMAN WHO WAS NEVER A FIDUCIARY IN THIS MATTER, AND THE STATUTE WAS NEVER INTENDED TO PROTECT A WRONGDOER SUCH AS HIM.

The courts below strongly relied upon the impact of N.J.S.A. 3B:17-8 in reaching the conclusion that Summary Judgment should be granted in favor of Gittleman. In so doing, however, the courts have totally misinterpreted and misapplied the clear language of the statute.

N.J.S.A. 3B:17-8 reads:

> A judgment allowing an account, including a guardian's intermediate account, after due notice, shall be res adjudicata as to all exceptions which could or might have been taken to the account, and shall constitute an approval of the correctness and propriety of the account, the legality and propriety of the investments and other assets, the legality and propriety of the changes in investments or other assets, and the legality and propriety of other matters, and also shall exonerate and discharge the fiduciary from all claims of all interested parties and of those

in privity with or represented by interested parties except:

a) for the investments and other assets in the fiduciary's hands at the close of the period covered by the account, and assets which may come into his hands after the close of the account;

b) insofar as exceptions to the account shall be taken and sustained; and

c) as relief may be had from a judgment in any civil action.

(Emphasis added)

The statute was intended only to exonerate and discharge a fiduciary from any claims of interested parties who did not take any exceptions to an account. Plaintiff took no exceptions to the account submitted by the Bank of New Jersey, and Judge Fisher was correct in interpreting this statute to bar plaintiff from any claims against the Bank of New Jersey which may have resulted from their involvement in Gittleman's wrongdoing. This was a proper result under the statute and plaintiff did not appeal this ruling.

To extend the statute to protect a wrongdoer such as Gittleman, however, is totally improper. He has never been a fiduciary in any aspect

of this matter. The statute was never intended to protect a wrongdoer such as Gittleman.

Plaintiff could not possibly have filed anything in the Probate Court to take exception to the wrongful forgery and misappropriation of funds by Gittleman. Those matters had never been disclosed at that time, and the Probate Court was obviously not a proper forum for such matters to be heard.

By the same token, Gittleman never made any application in the Probate Court for an allowance of fees against plaintiff. Therefore, there was no application to which plaintiff could have filed any exception.

The lower courts have committed obvious error in interpreting the aforesaid statute to shelter and protect the forgery and felonious misappropriation engaged in by Gittleman.

It is certainly anomalous that the lower courts would almost go out of their way to extend protection to a wrongdoer such as Gittleman while penalizing plaintiff, a totally innocent victim of Gittleman's forgery and felonious misappropriation of funds. Clearly, justice

cries out for a remedy.

(3). ATTORNEY MELVIN GITTLEMAN HAS BEEN REWARDED BY THE LOWER COURTS FOR HIS WRONGDOING. ALTHOUGH HE HAS OBVIOUSLY BEEN A PARTY TO CRIMINAL WRONGDOING AND SERIOUS ETHICAL MISCONDUCT, THE LOWER COURTS HAVE NOT EVEN MADE ANY REFERENCE TO SUCH VIOLATIONS AND HAVE TOTALLY GLOSSED OVER HIS REPREHENSIBLE ACTIONS. AS A MATTER OF PUBLIC POLICY, AN ATTORNEY AND OFFICER OF THE COURT SHOULD NOT BE PERMITTED TO AVOID ANSWERING CHARGES OF FORGERY OF A CLIENT'S CHECKS AND MISAPPROPRIATION OF A CLIENT'S FUNDS BY ASSERTING THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL, WHEN THE CLIENT NEVER HAD AN OPPORTUNITY TO PREVIOUSLY RAISE THOSE CHARGES AGAINST THE ATTORNEY.

The evidence clearly indicates that the defendant, Melvin Gittleman, Esq., engaged in illegal activity by obtaining and negotiating checks that were drawn by the Township of North Bergen to the order of the plaintiff, Eugene E. Mori. Acting as an attorney, the actions of Melvin Gittleman were highly improper and unethical, and violated the disciplinary rules and the Canons of Ethics. In effect, defendant Gittleman has profited by his

own wrongdoings. It is extremely unfair to permit defendant Gittleman to engage in illegal and unethical conduct without having to answer for same in a Court of Law.

It is clear that plaintiff was entitled to receive tax refunds from the Township of North Bergen totaling $121,609.05. It is further clear that the Township of North Bergen issued checks payable to plaintiff Eugene E. Mori for the refunds to which he was entitled.

By some illegal or deceptive technique, the details of which are still unknown, defendant Melvin Gittleman misappropriated checks which were issued to plaintiff in the sum of $31,968.83. Those checks were obviously negotiated by defendant Gittleman, and the only way such checks could have been negotiated would have been by forging plaintiff's signature as an endorsement on those checks.

Gittleman admits that he retained three checks issued by the Township of North Bergen, but explains nothing as to further details. In his Affidavit dated June 15, 1983, submitted

in support of his Motion for Summary Judgment, in paragraph 24, Gittleman states,

> "During April of 1979, the NORTH BERGEN BOARD OF COMMISSIONERS passed Resolutions authorizing payment of refunds based upon the 1978 settlement and upon receipt of those refunds, I forwarded them to the ADMINISTRATOR PENDENTE LITE in accordance with my instructions to that effect from the Administrator, with the exception of three checks totaling Thirty-One Thousand Nine Hundred Sixty-Eight Dollars and Eighty-Three Cents ($31,968.83)..."

Mr. Gittleman was able to avoid the taking of his Deposition at the Trial Court level, and plaintiff was thereby denied the opportunity to directly confront Gittleman and force him to answer some very serious questions concerning the improper activities in which he engaged. Plaintiff never authorized anyone to endorse his signature on the checks, and quite obviously his signature was forged either by Gittleman or by someone else at Gittleman's direction. Gittleman may very well have been working in conjunction with officials from the Township of North Bergen in an elaborate scheme to take wrongful advantage of plaintiff.

Perhaps even more shocking is the way Mr. Gittleman has presented his conduct to the Trial Court. He was never at all apologetic for his wrongful actions nor did he ever seem to regret them. On the contrary, he had the sheer audacity to create the erroneous impression that what he did was completely legal, proper, and beyond reproach, as if this was something done by every attorney every day.

Obviously, the actions of defendant Gittleman were governed by his greed as opposed to rational and legal behavior. If Gittleman were so interested in having his fee protected, it would appear that the most proper approach, as opposed to forgery, would have been to have the drafts issued both in his name and in the name of plaintiff, and to have deposited those checks into his trust account, pending a determination of the fair fees to which he was entitled. Gittleman's wrongful actions have prevented any court, at least up to this point, from ever having made a determination as to the fees to which he should be entitled for the

services rendered to plaintiff. Certainly, Judge Wood never made this determination.

It is respectfully submitted that defendant Gittleman has breached his professional duties as a lawyer by attempting to avoid a trial on the merits through technical and procedural manipulation. An examination of the Rules governing professional responsibility will easily bear this out.

Rule 6 titled "Judicial Ethics and Professional Responsibility" of the United States District Court for the District of New Jersey, states that the Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association as amended by the Supreme Court of New Jersey and the Code of Judicial conduct of the American Bar Association shall govern the conduct of the judges and the members of the Bar admitted to practice in this Court.

The following Rules are applicable in this situation:

> (1) D.R. 1-102(A)(4) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(2) D.R. 1-102(A)(5) states that a lawyer shall not engage in conduct that is prejudicial to the administration of justice;

(3) D.R. 1-103(A) states that "a lawyer possessing knowledge of a violation of D.R. 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.".

Gittleman clearly engaged in fraud, deceit and misrepresentation when he wrongfully misappropriated the checks that rightfully belonged to plaintiff. Justice calls for an accounting to be made of defendant's actions. Mr. Gittleman has certainly engaged in conduct that is prejudicial to the administration of justice by attempting to escape litigation pertinent to this fraud through technical maneuvering and machination. Therefore, defendant has violated not only D.R. 1-102(A)(4), but also D.R. 102(A)(5). Further, by failing to thoroughly account for his wrongdoing through litigation, defendant has violated D.R. 1-103(A).

The relationship between an attorney and his client is a highly sensitive one, imposing strict obligations upon the attorney. The standards

to which an attorney is held are significantly higher than those to which the average citizen is held. An attorney is held to a much higher standard of accountability and, as a matter of public policy, should not be permitted to maneuver through legal technicalities to avoid a hearing on the merits with respect to the fairness of his fees, alleged forgery, and the propriety of conduct in which he engaged during the existence of the attorney-client relationship.

One would think that if Mr. Gittleman were totally innocent of all the charges that have been made against him, he would have welcomed a full hearing that would clear his record. It indeed seems strange that he would have gone to such great pains to circumvent a hearing unless he were a culpable party.

Copies of the three checks taken by Mr. Gittleman were annexed as Exhibits to his Motion for Summary Judgment. Each of the three checks are drawn to the order of Eugene E. Mori as payee. Plaintiff never saw those checks prior

to their having been submitted with the brief, and plaintiff never endorsed his signature on any of those checks. We are therefore clearly dealing with a case of forgery.

It is respectfully submitted that it was improper to grant Summary Judgment to defendant Gittleman on the basis of his illegal and unethical conduct. It seems strange indeed that the lower courts made no mention or comment whatsoever about this very wrongful conduct in which Mr. Gittleman engaged. Apparently, the lower courts approved of such deceptive and illegal techniques. Hopefully, this court will not stamp it's imprimatur upon the very questionable conduct of Mr. Gittleman.

CONCLUSION

The calendars of trial courts become more and more crowded daily and there is increasing pressure placed upon trial judges to move and dispose of cases. The pressures of court calendars, however, should not subvert the reason we have a court system - - to dispense fair and impartial justice and to give each litigant a full and fair opportunity to have his case heard by an impartial trier of fact.

Unfortunately, it appears that the objective of the lower courts was something other than the fair and impartial administration of justice. As a result of technical maneuvering and machination, an obvious culpable wrongdoer has been rewarded for and permitted to profit by his wrongdoing. On the other hand, a totally innocent victim of such unjust injustice has been denied the opportunity to have his day in court.

If anything, this state of affairs certainly seems to be a sad commentary on the state of

the system of administration of justice in this country today.

The lower courts took the easy way out. It is respectfully hoped that the United States Supreme Court will recognize the gross miscarriage of justice that has occurred and will grant plaintiff's Petition for Certiorari.

Respectfully submitted,

EUGENE EWAN MORI

Dated: April 26, 1985